

UNITED STATES OF AMERICA,
Plaintiff,
vs.
CHASE A. HENDERSON et al.,
Defendants.

ORDER

The Court denies the motion because there is no ripe issue for the Court to adjudicate. That is not to say that the Government may not conduct the requested consumptive testing; it is to say that the Government requires no prior permission, and the Court will not advise the

1 Government prospectively as to whether the requested testing would violate due process in the
2 absence of factual allegations by a Defendant raising such an issue.

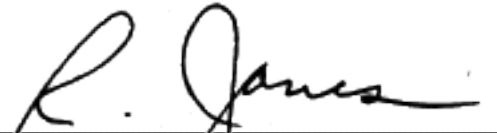
3 The relevant case law, *Arizona v. Youngblood*, 488 U.S. 51 (1988), concerns remedies to
4 be imposed where the Government has lost or destroyed evidence in bad faith, e.g., suppression
5 of evidence, adverse inference instructions, or perhaps vacation of conviction, depending on
6 when a defendant discovers evidence of bad faith and makes his motion. The *Youngblood* Court
7 ruled that due process is not offended by failure to preserve “potentially useful” evidence, as
8 opposed to “exculpatory” evidence under *Brady*, absent bad faith by the Government. *See id.* at
9 57–58. The Court is aware of no criminal rule or common law procedural requirement for the
10 Government to obtain permission to consume evidence in the first instance, however, and the
11 Court cannot issue an advisory opinion. If a Defendant later believes the state has acted in bad
12 faith in failing to preserve potentially useful evidence, he may seek an appropriate remedy
13 depending on the stage of the proceedings. But the Government cannot ask a court to advise it
14 prospectively as to whether its consumption of evidence would necessarily satisfy *Youngblood*.
15 If there is no bad faith, such a ruling is unnecessary, and if bad faith is later discovered, a ruling
16 in the Government’s favor now will not insulate it from an appropriate defense motion later.
17 Bad faith need not be discovered or shown before the destruction of the material. It need only be
18 shown (whenever discovered by a defendant) that the Government acted in bad faith at the time
19 the evidence was destroyed, i.e., that it knew of the exculpatory value of the evidence before its
20 destruction. *United States v. Zaragoza-Moreira*, 780 F.3d 971, 977 (9th Cir. 2015) (citing
21 *Youngblood*, 488 U.S. at 56 n.*; *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993)).
22 Just because there is no evidence of bad faith now, does not mean Defendants may not discover
23 it later. The Court will not make a *Youngblood* ruling in the absence of allegations of bad faith
24 destruction of evidence by a Defendant.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Consume Evidence (ECF No. 30) is
DENIED.

IT IS SO ORDERED.

DATED: March 30, 2016.



ROBERT C. JONES
United States District Judge